

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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### Summary

Reading Broadcasting, Inc. ("RBI") seeks to enlarge the proceeding to determine whether Adams Communications Corporation ("Adams") misrepresented facts and/or lacked candor with respect to five different subject areas. After reviewing the motion, Adams' opposition, and RBI's reply, the Bureau believes that substantial questions of fact about Adams' veracity are not raised. Accordingly, the motion should be denied.

In so concluding, the Bureau recognizes that Adams' principals have made seemingly inconsistent statements relative to four of the five subject areas cited in the motion. However, each of those subject areas appear related to abuse of process issues, and the Bureau believes the public interest is better served by considering the alleged inconsistent statements in conjunction with all the evidence already adduced. Should such consideration result in a determination that deceit occurred during the hearing, Adams may be disqualified without addition of a separate issue.

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In re Applications of	)	MM Docket No. 99-153
	)	
READING BROADCASTING, INC.	)	File No. BRCT-940407KF
	)	
For Renewal of License of	)	
Station WTVE(TV), Channel 51	)	
Reading, Pennsylvania	)	
	)	
and	)	
	)	
ADAMS COMMUNICATIONS	)	File No. BPCT-940630KG
CORPORATION	)	
	)	
For Construction Permit for a New	)	
Television Station to Operate on	)	
Channel 51, Reading, Pennsylvania	)	

To: Administrative Law Judge  
Richard L. Sippel

ENFORCEMENT BUREAU'S OPPOSITION TO  
READING BROADCASTING, INC'S MOTION TO ENLARGE ISSUES  
(MISREPRESENTATION/LACK OF CANDOR)

1. On July 17, 2000, Reading Broadcasting, Inc. ("RBI") filed a motion to enlarge issues ("Motion"). Adams Communications Corporation ("Adams") filed its opposition on August 4, 2000, and RBI filed its reply on August 18, 2000. Pursuant to a directive from the presiding Administrative Law Judge ("ALJ"),<sup>1</sup> the Enforcement Bureau hereby submits the following comments in opposition.

2. RBI seeks to add a misrepresentation/lack of candor issue against Adams. According to RBI, Adams has been untruthful in testimony and/or written submissions with respect to five subject matters. As will be shown below, all but one of those matters

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<sup>1</sup> See Tr. 2611. See also Order, FCC 00M-43, released June 26, 2000.

relate to abuse of process issues that have been the subject of extensive testimony and documentary evidence. The other pertains to a matter that arose during the hearing and is not directly related to any particular issue under consideration. For the reasons that follow, the Bureau disagrees with RBI that further inquiry is needed to address apparent inconsistencies in Adams' testimony and/or written submissions. Rather, the Bureau believes that RBI's allegations fail to raise a substantial question of fact and that additional proceedings are not warranted. Nevertheless, should the ALJ opt to add misrepresentation/lack of candor issues, the Bureau requests that any issue so specified state with particularity the subject area to be explored in order to keep the hearing focused. *See, e.g., Bennett Gilbert Gaines*, 9 FCC Rcd 533 (1994)

3. Background. By motion filed November 2, 1999, RBI sought, *inter alia*, to have an abuse of process issue added to this proceeding. In this regard, RBI contended that Adams' application was filed for an improper purpose, contrary to section 311(c)(3) of the Communications Act of 1934, as amended.<sup>2</sup>

4. After reviewing the available information, the Bureau opined that addition of an abuse of process issue would appear appropriate unless Adams provided a detailed and documented explanation that evidenced a *bona fide* desire to operate Channel 51 in Reading. Following review of Adams' opposition, the Bureau opined that Adams had done little to dispel the inference that it had made little or no effort to assess the quality of WTVE's community service prior to the time Adams filed its application. Nevertheless, the Bureau concluded that the circumstances surrounding the filing of Adams' application and its subsequent behavior differed enough from the circumstances present

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<sup>2</sup> 47 U.S.C. § 311(c)(3).

in WWOR-TV, Inc., 6 FCC Rcd 1524 (1991) (subsequent history omitted) that addition of the requested issue was not appropriate.

5. The ALJ, after reviewing the pleadings and hearing testimony from Adams' principal, Howard N. Gilbert, added the following issues:

To determine whether Adams Communication Corporation has abused the Commission's comparative renewal processes by the filing of a broadcast application for speculative and/or other improper purposes.

To determine whether such allegations of an abuse of process, if true, disqualify Adams Communications Corporation from receiving a Commission license.

Memorandum Opinion and Order, FCC 00M-07, released January 20, 2000.

Subsequently, the ALJ modified the issues to read as follows:

- A. To determine whether the principals of Adams Communications Corporation ("Adams") filed, or caused to be filed, an application for construction permit in the hope or expectation of achieving through litigation and settlement, a "precedent" or other recognition that the home shopping television broadcasting format does not serve the public interest.
- B. To determine in light of findings and conclusions as to issue A above, whether the principals of Adams Communications Corporation had, and continue to have, from June 30, 1994, to the present, a bona fide intention to construct and operate a television broadcasting station at Reading, Pennsylvania.
- C. To determine in light of findings and conclusions as to issues A and B above, whether Adams Communications Corporation has engaged and/or is engaging in an abuse of process, i.e., an abuse of the Commission's comparative renewal litigation and settlement process.
- D. If issues A and/or B and/or C are true, to determine whether Adams Communications Corporation is qualified to receive a Commission license, even if Adams would be willing to accept a settlement payment that is limited to legitimate and prudent expenses in return for dismissing its application.

Memorandum Opinion and Order, FCC 00M-19, released March 6, 2000. Evidence was received on the abuse of process issues from June 12 through June 21, 2000.

6. Discussion. A motion to enlarge must be based on specific allegations of fact. Folkways Broadcasting Co., 33 FCC 2d 806, 811 (Rev. Bd. 1972). Those allegations must raise a substantial and material question of fact. *See* Armando Garcia, 3 FCC Rcd 1065 (Rev. Bd. 1988). Section 1.229 of the Commission's rules<sup>3</sup> requires that the motion's allegations of fact, except for those of which official notice may be taken, must be supported by affidavits from persons with personal knowledge of the facts alleged. Review of the Motion reveals that, except where noted herein, RBI is relying on matters of record or on matters related to discovery in this proceeding about which there is no dispute as to authenticity or accuracy. Thus, official notice of virtually all facts alleged is appropriate

7. Section 1.229 of the Commission's rules<sup>4</sup> also contains various other requirements. Given the timing and circumstances of RBI's motion, it is apparent that RBI is relying on section 1.229(b)(3) of the Commission's rules.<sup>5</sup> That provision provides in pertinent part:

... Except as provided in paragraph (c) of this section, the motion will be granted only if good cause is shown for the delay in filing. Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.<sup>6</sup>

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<sup>3</sup> 47 C.F.R. § 1.229.

<sup>4</sup> *Id.*

<sup>5</sup> 47 C.F.R. § 1.229(b)(3).

<sup>6</sup> To the extent that RBI's motion is in actuality based on "new facts," the ALJ extended the date for filing the motion to July 17, 2000, beyond the 15-day limit, to allow review of the June hearing transcripts. *See* Order, FCC 00M-42, released June 23, 2000.

Thus, to the extent that the Motion is based on “facts” that came to its attention prior to June 2000, RBI must either show good cause for the delay or meet the requirements imposed by paragraph (c). That provision provides that the motion may be considered fully on its merits only if it raises a “question of probable decisional significance and such public interest importance as to warrant consideration in spite of its untimely filing.”<sup>7</sup>

8. Notwithstanding that the Motion is devoid of a good cause showing and is, to an extent, untimely, the Bureau concurs with RBI that a substantial question of deception constitutes a question of decisional significance and sufficient public interest importance to warrant consideration. See Policy Regarding Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, 1210-11 (1986) (subsequent history omitted) (“Character Qualifications”). Accordingly, the Motion meets the procedural requirements imposed by section 1.229 of the Commission’s rules.<sup>8</sup>

9. As noted, RBI alleges that Adams misrepresented facts and/or lacked candor. Misrepresentation involves false statements of fact made with intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983) (“Fox River”). Lack of candor involves concealment, evasion or some other failure to be fully informative, also with intent to deceive. Fox River, *supra*. The duty of candor requires an applicant before the Commission to be “fully forthcoming as to all facts and information relevant” to its

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<sup>7</sup> 47 C.F.R. § 1.229(c).

<sup>8</sup> 47 C.F.R. § 1.229.

application. Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Relevant information is such that may be of “decisional significance.” RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982). Intent to deceive can be inferred from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent can also be inferred from motive. See Joseph Bahr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). In addition, indifference and wanton disregard for accuracy is equivalent to an affirmative and deliberate intent. RKO General, Inc. v. FCC, *supra*, 670 F.2d at 225. Finally, truthfulness is as expected in discovery as it is in submissions to the Commission itself. Edwin A. Bernstein, 6 FCC Rcd 6841, 6844 n. 6 (Rev. Bd. 1991). However, an issue should not be added unless the totality of the evidence raises a substantial question about Adams’ veracity. See Astroline Communications Limited Partnership v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (“Astroline”). Conversely, if it is determined that Adams deliberately gave false testimony during the hearing, disqualification can occur without the need for a further hearing. Richardson Broadcasting Group, 7 FCC Rcd 1583 (1992), *aff’d by judgment sub nom. Younts v. FCC*, No. 92-1119 (D.C. Cir. May 10, 1993) (“Richardson”). With the foregoing in view, our analysis of RBI’s motion follows.

10. **The WTVE Challenge.** RBI’s first claim is that Adams has given inconsistent testimony as to why it filed its application for channel 51 in Reading. In this regard, RBI contends that Adams repeatedly declared that its goal in filing its application was elimination of home shopping programming from broadcast stations. RBI then posits that, upon addition of the abuse of process issues noted above, Adams backed



away from that position in order to address the concerns of the presiding officer and make it appear that Adams filed its application in order to operate a broadcast station in Reading. In support, RBI focuses on an interrogatory answer Adams submitted on May 16, 2000, and on one part of an answer provided at the hearing on June, 21 2000, by Adams' principal Howard N. Gilbert. Read together, those submissions reflect, *inter alia*, that Mr. Gilbert perceived that a comparative challenge to a licensee using a home shopping format could be a reasonably inexpensive way to acquire a broadcast station. RBI then contends that Adams' "newfound intent to obtain a television station at a "bargain price" by challenging home shopping stations is a convenient fabrication." Motion, p. 9. In this regard, RBI argues that there is no basis for believing that obtaining a station through the comparative renewal process is less expensive than an outright purchase. Finally, after analyzing the history of Adams' "predecessor's" efforts to acquire a television station in Chicago,<sup>9</sup> RBI reiterates its contention that Adams' statement of intent to own and operate a station in Reading is a lie.

11. At the outset, the Bureau notes that the Commission must already decide whether Adams filed its application for disqualifying, abusive reasons. *See* para. 5, *supra*. In this connection, the Commission will have to determine, *inter alia*, why Adams challenged RBI. In so deciding, the Commission will necessarily address the believability (or lack thereof) of the asserted motivations that underlay Adams' decision

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<sup>9</sup> The Bureau recognizes that there is not an exact identity of principals between Adams and Monroe Communications Corporation ("Monroe"). However, the lead actors, Messrs. Gilbert, Haag, Umans and Fickinger, appear in both entities, and the Adams group consists primarily of individuals who held substantially the same interests in Monroe as they now hold in Adams. Thus, for all practical purposes, Adams is the successor to Monroe, and, conversely, Monroe is the predecessor of Adams.

to file its application, motivations that are already the subject of hundreds of pages of testimony and of documents in the record. In particular, the Commission will review the history of the Monroe/Chicago proceeding, including the reasons why Monroe settled, in order to assess the *bona fides* of Adams' filing. Adding a separate misrepresentation/lack of candor issue because, arguably, Adams may have had multiple motivations for its filing will do little or nothing to further resolution of the abuse of process issues. More importantly in connection with this aspect of its motion, RBI does not raise a substantial question<sup>10</sup> that any statement of fact from Adams is false.

12. RBI's claim of misrepresentation/lack of candor starts with the notion that Adams did not begin to claim that its primary purpose for filing its application was the ownership and operation of a station in Reading until the presiding officer added the abuse of process issues detailed above. (Motion, p. 6) However, the Motion fails to point out where Adams has ever asserted that its primary, much less its only, purpose for filing was to own and operate a broadcast station in Reading. Rather, the Motion demonstrates that Adams has proffered multiple reasons – none of which are inherently contradictory or mutually exclusive – for challenging RBI. Thus, simply because Adams has asserted multiple goals, one of which is the ownership and operation of a television

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<sup>10</sup> A “substantial” question is one that is fairly debatable or one that could very well be decided in favor of the petitioner. United States v. Messerlian, 793 F.2d 94, 96 (3<sup>rd</sup> Cir. 1986).

station on channel 51 in Reading,<sup>11</sup> it does not follow that there exists a substantial question about the truthfulness of any one of those goals.

13. Next, RBI focuses on the following colloquy between Mr. Cole, Adams' counsel, and Mr. Gilbert:

Question: Could you tell me why Adams decided to file a comparative renewal application, that is, a challenge application against an incumbent renewal licensee?

Answer: Because it was a low-cost way to obtain a television station. It's also a way that we could do what we want to do in the broadcast industry, which was to provide some public service.

From the foregoing and the related questions and answers that followed, the Motion asserts that Mr. Gilbert lied when he responded that one of the reasons for Adams' filing was that a comparative renewal challenge against a home shopping station was a low-cost way to obtain a license.

14. In the Bureau's view, the Motion does not raise a substantial question of fact that Mr. Gilbert's answer was false.<sup>12</sup> First, the Motion does not demonstrate that Mr. Gilbert had previously given a different, inconsistent answer to the question posed by Mr. Cole. Instead, the Motion merely reveals that, during depositions, Adams' principals were asked related but different questions, which resulted in answers that somewhat

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<sup>11</sup> In this regard, the Bureau notes that, on October 14, 1999, some weeks before RBI's motion to enlarge with respect to Adams' alleged abuse of process, Mr. Gilbert asserted in his deposition that: "We intend to operate the station." Motion, Attachment A, deposition, p. 22.

<sup>12</sup> Should Adams prevail in this proceeding, there is nothing in the record to suggest what it is likely to spend on prosecution of its application relative to what it would have cost to buy the station in June 1994. Rather, the only remotely pertinent information on this matter is a WTVE appraisal from June 1999, which placed the value of the station at that time at \$10.6 million. Adams Ex. 75, p. 14.

differed from the one the Motion deems untruthful. In particular, review of the Gilbert deposition segments attached to the Motion reveals that Mr. Gilbert was never directly asked why Adams filed its application. Rather, the questions and answers focus on what the Adams' principals, primarily Mr. Gilbert, did before deciding to file their Reading application. Likewise, the portion of the Gilbert declaration quoted by RBI (RBI Ex. 24, para. 7) addresses the reasons for Adams' formation in November 1993, not why it filed the Reading application in June 1994.

15. The Bureau also believes that the Motion's reliance on the back-and-forth between the presiding officer and Mr. Gilbert, which occurred in January 2000, is similarly unhelpful. That colloquy does nothing more than indicate that Mr. Gilbert viewed the presence of home shopping on a broadcast channel as inconsistent with the public interest. Nothing in the Motion adequately explains why such a view rules out the answer Mr. Gilbert gave in his June hearing testimony.

16. Finally, the Bureau finds speculative the Motion's claims that, in 1994, Adams could not have seriously considered using Spanish-language programming in Reading and that any such contention on Adams' part to bolster its supposed intent to operate a station in Reading is a lie.<sup>13</sup> In this regard, even though Monroe settled its challenge in late 1992 due, arguably in part, to the unavailability of Spanish-language programming in Chicago, it does not follow that such programming would be similarly unavailable in Reading by the time Adams might need access to it. More to the point, the Motion does not show that such programming was ever unavailable in Reading. Indeed,

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<sup>13</sup> This matter is discussed further herein in connection with the "Programming in General" portion of the Motion.

WTVE became a Telemundo affiliate after Adams filed its application, but well before the inception of the instant proceeding.<sup>14</sup> It thus appears that if, indeed, Adams fostered a belief that it could serve the Reading audience with Spanish-language programming by the time it acquired a permit to build channel 51, such a belief was reasonable and capable of effectuation.

17. In short, the Bureau believes that this portion of the Motion should fail. Despite its efforts, RBI does not raise a substantial question of fact that any of the cited deposition testimony, hearing testimony or written submissions contain false statements, much less that the maker of the statement had reason to know the statements were false. Accordingly, this aspect of the Motion should be denied.

18. **Dealings with Telemundo.** RBI submits that Adams concealed its involvement with Telemundo and that, when it could no longer deny having had involvement, Adams sought to minimize and justify its dealings with Telemundo. According to RBI, these dealings concerned potential settlement and use of Telemundo as a programmer. Because the Bureau believes that each aspect is discrete, we will analyze each separately.

19. **Settlement.** With respect to its claim that Adams has made deceptive statements relative to an appraisal of WTVE and potential settlement, RBI points to testimony from Mr. Gilbert's deposition. That testimony reveals that, in response to a question about whether Mr. Gilbert had had any discussions about potential sale of Adams' permit were it to be granted, Mr. Gilbert mentioned Telemundo but did not

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<sup>14</sup> See RBI Ex. 11 (1999 ownership report).

disclose the details of his dealings with the company. Further, in response to the question: "Do you recall any other discussions with any party outside of Adams Communications about a potential settlement of the case?" Mr. Gilbert answered: "None." The Motion recounts similar assertions in a declaration submitted by Mr. Gilbert and additional testimony given by him on January 12, 2000. In light of conversations that occurred primarily between M. Anne Swanson, Telemundo's attorney, and Mr. Gilbert between April and July 1999, which led to an appraisal of WTVE, RBI charges that Mr. Gilbert's deposition and hearing testimony were plainly false. The Motion reiterates this position with respect to an Adams interrogatory answer filed on April 19, 2000. Finally, the Motion charges that testimony given by Mr. Gilbert on June 21, 2000 constitutes nothing more than a further effort to obfuscate Adams' involvement with Telemundo. The Motion concludes: "Adams' testimony with respect to its dealings with Telemundo concerning the prospects of settlement is plainly and knowingly false." (Motion, p. 27)

20. In assessing this aspect of the Motion, the Bureau believes that Adams' opposition at pp. 12-15 fairly sets forth the pertinent facts. Thus, it appears that, beginning in late April 1999, Ms. Swanson commenced efforts that, ultimately, could have led to a settlement of this proceeding. Specifically, she hired an appraiser to obtain an appraisal of WTVE, and she persuaded Adams (Mr. Gilbert) to help pay a portion of the cost.<sup>15</sup> Once the appraisal was completed, she attempted to get Adams and RBI to discuss settlement but was unsuccessful. In this regard, the record reflects that no figures

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<sup>15</sup> She also attempted to have RBI pay for part of the WTVE appraisal. The record does not clearly reveal whether RBI contributed anything toward the appraisal's cost. *Cf.* Tr. 2245, 2270-71.

were ever discussed with Adams and that Ms. Swanson never talked with RBI at all about settlement because Micheal Parker, RBI's president, apparently did not want to become involved until Telemundo had reached a definitive understanding with Adams, which never occurred. Tr. 2271-73. Moreover, to the extent that Ms. Swanson considered introduction of a "white knight," the Motion fails to identify anyone who was willing to buy out RBI and Adams. On the contrary, it appears that Ms. Swanson was never able to secure a suitable candidate. Tr. 2193-96, 2205-07, 2302.

21. In short, it appears that while Ms. Swanson wanted a universal settlement, which, among other things, would protect Telemundo's status as a programmer to channel 51 in Reading, she received insufficient cooperation from Adams and virtually none from RBI. Tr. 2205-07, 2212-13, 2220-21, 2225, 2229, 2237, 2242, 2302. Consequently, any "discussion" concerning settlement, was, at most, preliminary in nature, never involved RBI, never reached a point where a settlement offer of any kind was made by anyone to Adams, and never reached a point where Adams described any conditions that might lead toward a settlement. Thus, the conversations that occurred between Ms. Swanson and Mr. Gilbert were plainly of a different nature than the other settlement "discussions," which involved Mr. Gilbert's rejection of direct overtures made by Mr. Parker and another person whose identity he did not know or could not remember.<sup>16</sup>

22. The Bureau believes that, judged against this background, Mr. Gilbert's testimony and Adams' related submissions, with one exception, do not even remotely

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<sup>16</sup> According to RBI, the identity of the unknown person was Adam Lindemann, who is described as an executive with a Spanish-language programmer. Motion, Exhibits C and D; Reply, p. 17.

raise a substantial question of deceit by Adams. The exception involves the following exchange that occurred during Mr. Gilbert's deposition, which is cited at p. 20 of the Motion:

Q: Do you recall any other discussions with any party outside of Adams Communications about a potential settlement of the case?

A: None.

By comparison, in responding to an interrogatory that posed a different question,<sup>17</sup>

Adams acknowledged its contacts with Telemundo.

Interrogatory 28: Describe with particularity all communications with other parties after filing your application in this matter concerning a potential settlement of the matter or the value or potential value of WTVE or the proposed television station or construction permit in Reading, Pennsylvania.

Answer: ... In approximately May, 1999, Adams was approached by Anne Swanson, a communications attorney. To the best of Adams's recollection, Ms. Swanson indicated that she had a client who might be interested in participating in a buy-out, or "white knight", settlement of the Reading proceeding. She also indicated that her client was interested in obtaining an appraisal of Station WTVE(TV), and that her client was willing to share that appraisal with RBI and Adams if they were willing to share in the costs of the appraisal on a pro rata basis. Mr. Gilbert, on behalf of Adams, agreed to pay for one-third the cost of the appraisal. A copy of the appraisal was provided to Mr. Cole by Ms. Swanson by letter dated June 3, 1999. Mr. Gilbert did not view the cost-sharing arrangement for the appraisal as relating to any "potential settlement" as far as Adams was concerned; rather, he was curious about the potential value of a

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<sup>17</sup> Likewise, in responding to different questions during his June 21, 2000 hearing testimony, Mr. Gilbert related his conversations with Ms. Swanson. *See* Motion, pp. 25-26. In those responses, Mr. Gilbert related that, if the matter of settlement arose, he told Ms. Swanson that Adams was not interested in settlement. By way of comparison, Ms. Swanson's June 19, 2000 hearing testimony, which referenced and affirmed notes she had taken during her conversations with Mr. Gilbert, indicates that while Mr. Gilbert told her that Adams planned to litigate he would not say no to her exploring whether settlement was possible and that his people were reasonable. However, she had no recollection of what Mr. Gilbert actually said to her. Tr. 2220-24.



television station in Reading, and the cost to Adams of the appraisal, i.e., approximately \$3,000, or one-third the total cost of the appraisal, was sufficiently low to justify satisfying that curiosity. To the best of Mr. Gilbert's recollection there were no communications between Ms. Swanson and Adams concerning any potential settlement following Adams' receipt of the appraisal.

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Considering that Mr. Gilbert understood that Ms. Swanson was interested in achieving a settlement, he certainly could have responded differently to the question posed to him during his deposition. However, Mr. Gilbert's failure to have done so is insufficient to support a conclusion that he was obligated to answer that question differently considering that *he had already mentioned* Telemundo shortly before in conjunction with previous questions about buy-out offers made to Adams. Moreover, the differences between Mr. Gilbert's and Ms. Swanson's hearing testimony, when viewed in conjunction with Adams' interrogatory answer, do not raise a substantial question about the veracity of either Adams' testimony or interrogatory answer. Considering all of the circumstances, the Bureau does not believe it unreasonable for Adams to have viewed its willingness to share in the cost of an appraisal as not relating to a potential settlement. In sum, a misrepresentation/lack of candor issue regarding Adams' responses and submissions related to a settlement involving Telemundo is unwarranted.

23. Telemundo Programming. RBI also charges that Adams' testimony and submissions concerning Adams' dealings with Telemundo with respect to programming contain disqualifying falsehoods. Specifically, the Motion cites two questions to and answers by Mr. Gilbert, one during his October 1999 deposition and one during a January 2000 hearing session. Both seek to elicit whether anyone from Adams "had any discussions" with Telemundo "about providing programming to the station" in the event

the Adams application was granted. To both, Mr. Gilbert answered “No.” Pointing to conversations that occurred between Ms. Swanson and Mr. Gilbert in July 1999, RBI contends that Mr. Gilbert’s testimony was false and that his attempt to clarify the situation in subsequent testimony failed to do so.

24. Review of the applicant parties’ pleadings reveals basic agreement as to the underlying facts. First, there is no doubt that Mr. Gilbert repeatedly and unequivocally denied that he had had “any discussions” with any programmer about providing programming to Adams’ station should it successfully prosecute its application. Motion, p. 27. Second, in an apparent conflict with those answers, it is also clear that Mr. Gilbert made overtures to Telemundo via Ms. Swanson in order to line up programming. Motion, pp. 28-29; Opposition, p. 21. Finally, it is also clear that Mr. Gilbert’s testimonial attempt to reconcile his unequivocal denials about “discussions” with his efforts to secure an affiliation commitment from Telemundo regarding future programming was less than enlightening. *See* RBI Reply, p. 21. Thus, the question is whether the totality of the evidence raises a sufficient enough doubt about the truthfulness of Mr. Gilbert’s answers regarding “discussions” to warrant further inquiry. *See Astroline, supra*. The Bureau submits there is not enough doubt and that no further inquiry is warranted.

25. The word “discussion” has been defined as: “consideration of a question in open and usually informal debate.” Webster’s Ninth New Collegiate Dictionary (1988). Thus, the question of moment is whether Adams and Telemundo ever had any consideration of affiliation (or Telemundo’s provision of programming), and, if so, did it

reach the level of open “debate.”<sup>18</sup> As noted, the record evidence reflects nothing more than a query or two from Mr. Gilbert to Ms. Swanson about affiliation, followed by a decision from Telemundo (in accord with advice to that effect from Ms. Swanson) that it could not talk about affiliation with Adams so long as it had an affiliation with RBI. It further appears that Telemundo’s decision was communicated to Adams almost immediately and that the matter ended there. Reading Ex. 52, p. 14; Tr. 2277-2286; Motion, p. 29-30.

26. Thus, although consideration of possible affiliation between Adams and Telemundo certainly occurred, it appears there was no debate about the matter. Rather, Adams’ proposal or expression of interest regarding affiliation was rejected by Telemundo without any evidence of debate. Hence, there were no “discussions” between Adams and Telemundo about providing programming, and Mr. Gilbert’s answers to that effect were not untruthful.<sup>19</sup> Accordingly, addition of an issue is not warranted.

27. **The Sherwood Tapes.** RBI contends that Adams has misrepresented facts and/or lacked candor in describing events and circumstances related to Mr. Gilbert’s review of WTVE’s programming, which occurred prior to the filing of Adams’

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<sup>18</sup> The same dictionary defines “debate” as: “a contention by words or arguments: as ... **b:** a regulated discussion of a proposition between two matched sides.”

<sup>19</sup> To be sure, in responding to questions about “any discussions,” Mr. Gilbert certainly *could* have qualified his responses and related that he had attempted, without success, to interest Telemundo in being Adams’ programmer. Indeed, if the matter of possible affiliation between Adams and Telemundo had been relevant to any issue in this proceeding or could reasonably have led to the discovery of relevant evidence, the Bureau might have advocated addition of an issue. See RKO General, Inc., *supra* (applicant lacked candor where it responded to *factual allegations of concern to the FCC* with a general denial). However, considering the totality of the circumstances, the Bureau does not believe that the dispute as to whether Adams should have disclosed its attempts to secure affiliation with Telemundo rises to the level of a substantial question of fact regarding Adams’ candor.

application. Specifically, RBI argues that Mr. Gilbert has given contradictory and, in any event, exaggerated assessments of his pre-filing review in order to support Adams' claim that it filed its Reading application only after determining that RBI was not serving the public interest. Similarly, RBI charges that Mr. Gilbert exaggerated the extent of his contact with Paul Sherwood, the individual Adams hired in the spring of 1994 to tape WTVE programming. Finally, RBI submits that Mr. Gilbert lied in various assertions concerning the instructions he gave to Mr. Sherwood with respect to the taping of WTVE programming. RBI posits that the motive for deceit is apparent: Adams, in seeking to establish that it filed its application for a proper purpose, wants the Commission to believe that it conducted a *bona fide* review of WTVE's programming and concluded therefrom that it had a reasonable chance of success. Adams counters that RBI's charges are speculative and unwarranted.

28. Although it is concerned about certain aspects of Adams' showing, the Bureau believes that further inquiry is unnecessary. In this regard, as the Bureau has previously observed, the Commission is already going to assess what informed Adams' decision to file its application in order to determine whether the application was filed for a proper purpose. That assessment will include, *inter alia*, an analysis of what transpired between Mr. Gilbert and Mr. Sherwood. Thus, absent a significant factual dispute regarding the veracity of a statement of fact from Adams, which is reasonably capable of resolution through the taking of additional testimony and/or the submission of documentary evidence, the Bureau opposes further inquiry simply because certain intermediate facts relevant to the abuse of process issues cannot be determined with certainty.

29. That being said, an area of dispute which the Bureau believes warrants comment is the evidence regarding the timing, extent and nature of Adams' review of taped programming that occurred immediately prior to the filing of its application. As detailed in the Motion, Mr. Gilbert, in a November 22, 1999, declaration, stated that he "regularly" spoke with the person in charge of taping (Mr. Sherwood) during the course of two weeks of taping that occurred prior to the filing of Adams' application. RBI Ex. 24, p. 5. During this period, Mr. Gilbert also claimed that he was regularly "briefed" on the contents of the programming being taped. He concluded that: "The information which I obtained through those reports strongly confirmed my belief that the station was not serving the public." *Id.* In his hearing testimony on January 12, 2000, Mr. Gilbert amplified on his prior claims by indicating that he spoke *daily* with Mr. Sherwood and that he (Mr. Gilbert) had watched two weeks' worth of tapes that Mr. Sherwood had sent him. Motion, pp. 33-34, 40. Finally, in Interrogatory Answers filed on April 19, 2000, and in testimony given on June 21, 2000, Mr. Gilbert clarified that he reviewed in "real-time" the first 24 to 36 hours of tapes (subsequently lowered to six to 12 hours in supplemental answers filed on May 16, 2000) and utilized a fast forward function to review the remaining tapes. Motion, pp. 35-36. In addition, Mr. Gilbert revised his January testimony by stating that during the taping he spoke "a couple of times a week." Tr. 2492-93. By comparison, Mr. Sherwood confirmed that he sent tapes to Mr. Gilbert but could remember only one at length conversation during the taping process. Opposition, p. 26. Further, Mr. Gilbert acknowledged that he revised his previous claim about daily conversations on the basis of Mr. Sherwood's deposition. Tr. 2549.

30. Notwithstanding the differences in Mr. Gilbert's various utterances on the subject, the Bureau believes that the totality of the information does not raise sufficient doubt about Adams' veracity to warrant further inquiry. Most importantly, the evidence reflects that: Mr. Gilbert hired Mr. Sherwood to tape programming; Mr. Sherwood did so; Mr. Sherwood sent tapes to Mr. Gilbert; Mr. Gilbert reviewed tapes; and that Messrs. Gilbert and Sherwood had more than one conversation, at least one of which was "at length." Considering that the foregoing is based almost entirely on the memories of Messrs. Gilbert and Sherwood of events occurring nearly between five and six years earlier, it is not surprising that inconsistencies exist. In any event, the evidence indicates that Adams conducted some kind of review of WTVE's programming prior to the filing of Adams' application on June 30, 1994.

31. RBI argues strenuously that serious review by Mr. Gilbert and/or Mr. Sherwood could not possibly have occurred since, if it had, they would have realized that WTVE was not being taped, thereby giving the lie to Adams' claims on the subject. The Bureau does not believe that sufficient doubt on that score alone exists to justify further hearings. In this regard, the Bureau deems reasonable the possibility that Adams did not understand that it had mistakenly taped the wrong programming until 1999, when comparison of the tapes with WTVE's programming logs occurred. The evidence indicates that Mr. Gilbert wanted to know what non-home shopping programming was being broadcast on the home shopping channel in Reading. Tr. 2151. To that end he asked Mr. Sherwood to tape the Reading home shopping channel. Tr. 2139, 2151. However, Mr. Sherwood did not know that there were two sources of home shopping programming in the Reading area, which ultimately resulted in his taping the wrong

programming. Tr. 2154. The Bureau submits that substantial questions with respect to Adams' assertions concerning review are not raised merely because it did not know it had taped the wrong material.

32. Moreover, the Bureau does not believe that substantial questions about Adams' candor exist because Adams has apparently failed to set forth clearly and consistently the extent of its pre-filing efforts to review WTVE's programming. In this regard, the Bureau notes that RBI has proffered nothing that raises any serious doubt that Messrs. Gilbert and Sherwood had multiple contacts during the taping process and that some analysis of the taped programming occurred during the taping process. Adams Exs. 76, 77. Moreover, to the extent RBI believes Mr. Gilbert's self-serving and, concededly inconsistent testimony about those efforts casts doubt on Adams' *bona fides* regarding the filing of its application it can so argue in connection with the abuse of process issues. Likewise, it is free to argue that such testimony, along with any other testimony it believes deceitful, warrants Adams' disqualification. Richardson, *supra*.

33. Finally, the Bureau submits that RBI has failed to raise a substantial question about the instructions given by Mr. Gilbert to Mr. Sherwood. In this regard, the evidence does not now and is never likely to establish exactly what Mr. Gilbert asked Mr. Sherwood to tape. The instruction was given orally, and no one other than Mr. Gilbert and Mr. Sherwood was a party to the conversation. Mr. Gilbert thought he asked Mr. Sherwood to tape channel 51 out of Reading; Mr. Sherwood allowed that Mr. Gilbert may have asked him to do just that. Harmonizing their testimony, it appears that neither understood that more than one source of home shopping programming existed in the area. Thus, although Mr. Sherwood was theoretically capable of taping channel 51 via over-

the-air reception, he did not have the practical capability of taping it because he was relying on a cable feed and his cable system did not carry WTVE. Had Mr. Gilbert understood this, there is no reason to believe he would have bothered to hire Mr. Sherwood and pay him approximately \$2,000 to tape programming that would be totally useless for Adams' purposes. Rather, it is far more likely that Mr. Gilbert gave less than perfect instructions that were misapprehended by Mr. Sherwood. Considering all of the circumstances, the Bureau is convinced that a further hearing simply to try to resolve what Mr. Gilbert actually said would be pointless.

34. **Programming In General.** RBI alleges that Adams has given inconsistent explanations of the programming it intends to air should it obtain the permit for channel 51. RBI notes that in deposition testimony A.R. Umans, an Adams' shareholder and director, claimed that he had discussed the issue of programming with Mr. Gilbert and Robert Haag, and that Adams intended to use Spanish-language programming. RBI Ex. 45, p. 9. By comparison, Adams' application contains no such proposal, and Mr. Haag did not recall any discussions about how the station would be programmed. RBI Ex. 44, pp. 19-20. RBI reasons that either Mr. Umans' testimony is false or that the application was misleading.

35. In a related vein, RBI charges that Adams has further dissembled in attributing its plan to offer Spanish-language programming to Adams' principal Wayne Fickinger. In this regard, RBI notes that on January 12, 2000, Mr. Gilbert testified that the driving force behind Adams' interest in Spanish-language programming was Mr. Fickinger. By comparison, Mr. Fickinger's deposition testimony indicate that Adams' plan to use Spanish-language programming arose out of discussions between with two



other Adams' principals, which occurred around the time Ms. Swanson approached Mr. Gilbert in connection with the 1999 appraisal of WTVE. Nevertheless, on June 21, 2000, Mr. Fickinger testified that he had always understood that Adams would air Hispanic programming. Tr. 2444. RBI argues that Mr. Fickinger's efforts to harmonize his deposition testimony with his hearing testimony were less than persuasive, and his supposed understanding that Hispanic programming would be chosen is at odds with Monroe's decision to settle because of questions surrounding the availability of Spanish-language programming. (See discussion at para. 16, *supra*.) RBI further speculates that if Adams had always intended to use a Spanish-language programmer, it would have secured an agreement at an "early stage." According to RBI, Adams' failure to do just that renders questionable the various submissions Adams has made regarding its intent to air Spanish-language programming.

36. After reviewing the various statements from Adams regarding programming, the Bureau agrees with RBI that testimonial inconsistencies abound. Thus, it is by no means clear as to when, if ever, Adams formed a clear intention to use Spanish-language programming. However, notwithstanding that lack of clarity, it by no means follows that a misrepresentation/lack of candor issue is warranted. In this regard, RBI has not advanced, and the Bureau cannot readily discern, that any of the cited statements was coupled with intent to deceive. Thus, no further inquiry is warranted.

37. In connection with this portion of the Motion, the Bureau observes that the applicant parties have been skirmishing about Spanish-language programming almost from the outset of this proceeding. In July 1999, RBI sought to enlarge the issues by addition of a specialized programming issue; namely, its Spanish-language programming,

which it had been airing since June 1998. In opposition, Adams, among other things, argued that a specialized programming issue was not warranted because it, too, proposed to provide “essentially full-time Spanish-language programming comparable to that described in RBI’s Motion.”<sup>FN” 20</sup> In the accompanying footnote, Adams related that its principals (when they were in Monroe) previously “demonstrated a desire to provide Spanish-language programming,”<sup>21</sup> citing the Video 44 decision. In that decision, the Commission observed that Monroe had proposed in 1982 to reach an Hispanic audience in the Chicago area with a mixture of Spanish-language and English-language programming.<sup>22</sup>

38. It thus appears that for the past 17 years, the principals of Monroe and its successor-in-interest for all practical purposes, Adams, have contemplated at various times airing Spanish-language programming on a television station. It is therefore not surprising that the several Adams principals have declared that Adams intends to air such programming even though its application made no mention of such programming. It is also not surprising that those individuals have not presented consistent accounts as to when the decision was made or whether, and, if so, when discussions occurred. In sum, there is nothing to suggest that the Adams principals viewed the matter as significant enough to warrant a group discussion or decision. Moreover, given their collective experience in the Monroe proceeding, the Adams’ principals probably understood that it was pointless to focus on and make significant decisions about programming until there

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<sup>20</sup> See “Opposition of Adams Communications Corporation to Motion to Enlarge Issues,” filed August 16, 1999, p. 6.

<sup>21</sup> *Id.*, n. 5, pp. 5-6.

<sup>22</sup> Harriscopes of Chicago, Inc., 6 FCC Rcd 4948, 4950 (1991).

was some possibility that their application might be granted. Viewing the record as a whole, the Bureau does not believe substantial questions of fact are raised simply because Adams' principals have given inconsistent accounts about a matter that is truly hypothetical and will not have to be addressed unless Adams secures the permit.

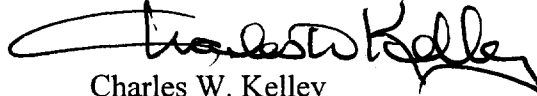
39. **Corporate Dissolution.** RBI's final contention is that Mr. Gilbert lied when he declared in hearing testimony on June 21, 2000, that Adams prepared and filed annual reports with the Massachusetts Secretary of State. In this regard, RBI observes that Massachusetts, on August 31, 1998, dissolved Adams apparently for having failed to file such reports. After being confronted with the dissolution notice, which he claims not to have previously seen, Mr. Gilbert submitted an application on or about June 22, 2000, to have the corporation revived and acknowledged therein that the corporation had been dissolved for failure to file annual reports. RBI notes that Massachusetts granted Adams' application on June 27, 2000. After reciting the provisions of the Massachusetts general laws, which, in sum, discuss the procedures related to corporate dissolution, RBI asserts that a substantial question is raised whether Adams knew about the failure to file reports and the fact of dissolution.

40. RBI's effort must fail. Contrary to the Motion's claims, it has not raised a substantial question of deception. In this regard, there is no doubt that dissolution occurred; that Adams sought revival of its status; and that revival was granted. However, there is *nothing* in the Motion to suggest that Adams, or more particularly, Mr. Gilbert, knew that Adams had failed to file reports and/or that Massachusetts had dissolved Adams for such failure. RBI's claims that Mr. Gilbert had such knowledge are sheer speculation. Inasmuch as a motion to enlarge cannot rely for a critical element on

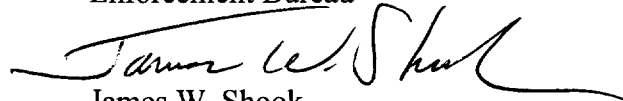
speculation, it follows that denial of this aspect of the Motion is required. See Garrett, Andrews & Letizia, 86 FCC 2d 1172 (Rev. Bd. 1981).

41. **Conclusion.** For the reasons given the Bureau submits that RBI's motion to enlarge should be denied.

Respectfully submitted,



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September 1, 2000


CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division certifies that she has on this 1st day of September, 2000, sent by facsimile or served by hand copies of the foregoing "Enforcement Bureau's Comments on Reading Broadcasting, Inc.'s Motion to Enlarge Issues (Misrepresentation/Lack of Candor)" to:

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